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ABSTRACT

Several Supreme Court decisions in the 1970s have rejected constitutional arguments aimed at eliminating exclusionary zoning and growth management schemes which allegedly maintain existing problems of racial and income segregation in major metropolitan areas. These decisions have led observers to conclude that the Supreme Court has greatly narrowed the range of legal tools that can be used to strike down barriers to neighborhood integration. This conclusion ignores the facts that Federal legislation and State constitutions provide other usable legal remedies which may prove superior to the constitutional clauses on interstate commerce and equal protection as arguments for integration; furthermore, it is difficult to interpret education, housing, and travel as being "implicit rights" in the United States Constitution. In emphasizing legal technicalities, the controversy over recent trends in Federal court decisions on residential segregation fails to focus on the real issue, namely the difficulty of building low and moderate income housing in the suburbs. While the legal tools for doing so may be available, the political support and funds are not. Ultimately, the construction of such housing will depend on private builders and legislation rather than on judicial processes. The fundamental issue is the effect judicial removal of zoning barriers in suburban areas will have on the supply and cost of housing. (Author/MJL)

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IS THE DOOR IN THE INVISIBLE WALL CLOSING?

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Is the Door in the Invisible Wall Closing?

A number of important federal court decisions in the 1970's have convinced many observers that the "invisible wall" of exclusionary land use controls preventing integration of suburban communities in major metropolitan areas has received explicit judicial endorsement. Such cases include Warth v. Seldin, Arlington Heights, Ramapo, Petaluma, Steel Hill, Valtierra, Eastlake, and Belle Terre. In these decisions, federal courts have rejected a number of constitutional arguments against exclusionary zoning and growth management schemes including rights to education, housing, and travel. Effectively federal courts have tended to withdraw from review of local zoning decisions.

This paper considers the impact of that judicial movement on suburban integration. We suggest an alternative interpretation of events and their likely consequences. First, the door in the invisible wall is wide open through other usable legal remedies, particularly federal legislation (Fair Housing Act of 1968) and state constitutions (as in Pennsylvania and New Jersey), which may prove to be superior to the interstate commerce or equal protection clauses. Second, too little attention has been paid by critics to the genuine difficulties that federal courts encounter in trying to read education, housing, and travel into the U. S. Constitution as "implicit rights"; such rights are simply not mentioned at all. Third, the controversy over the recent trend in federal decisions has focused largely on the legal technicalities, as advocates of residential integration search for new strategies to overcome the Supreme Court's now rather obvious reluctance to discover a constitutional mandate for the judicial remedy of residential segregation.

Not only is it the case, contrary to most critics, that the zoning or growth management barriers to residential integration can be effectively knocked down without a constitutional basis, but these barriers are the least important problem. The real difficulty is to build low and moderate income housing in the suburbs. The legal tools for doing so are available. The political support and funds are not. Ultimately, the will and the money to construct such housing is a legislative, not a judicial, problem. Either private builders or legislatures must supply housing. The fundamental issue is what effect judicial removal of zoning barriers in suburban areas will have on the supply and cost of housing. Along these lines the notorious Ramapo and Petaluma plans are examined. Policy recommendations are framed in the conclusion to the paper.

Is the Door in the Invisible Wall Closing?

A number of important federal court decisions in the 1970's have convinced many observers that the "invisible wall" (Branfman et al., 1973) of exclusionary land use controls preventing the integration of suburban communities in major metropolitan areas has obtained explicit judicial sanction. For example, one author concluded that "the Supreme Court has gone about as far as possible to eliminate the use of the United States Constitution as a meaningful remedy for segregation (racial or low-income)" (Pearlman, 1978, p. 166). The same position was espoused by White (1978).

In Warth v. Seldin (1975), the Supreme Court denied, to both developer and minority plaintiffs, any standing to sue against an admittedly exclusionary zoning ordinance in a suburb of Rochester, New York. Metropolitan Housing Development Corp. v. Village of Arlington Heights (1977) refused to order a rezoning for federally subsidized multifamily housing in a Chicago suburb. By declining to review lower court decisions, the Supreme Court has permitted growth management schemes in Golden v. Planning Board of the Town of Ramapo (1972) and Construction Industry Association of Sonoma County v. City of Petaluma (1976), and large-lot zoning requirements in Steel Hill Development, Inc. v. Sanborton (1973). It has approved the use of local referenda to block new residential development in James v. Valtierra (1971) and City of Eastlake v. Forest City Enterprises (1976). The latter case reversed the Ohio Supreme Court to uphold a local ordinance requiring that rezoning decisions be approved by a 55 percent majority. At least five other Ohio communities have since adopted similar policies (White, 1978, p. 187). Village of Belle Terre v. Boraas (1974) supported a Long Island community's refusal to permit conversion of existing housing to higher densities.

In these decisions, the Supreme Court has rejected a number of constitutional arguments aimed at breaking through the invisible wall of exclusionary zoning and growth management schemes which allegedly maintain existing patterns of racial and income segregation in major metropolitan areas. Application of the interstate commerce clause (the argument that exclusionary zoning or growth management by local government infringes a constitutional right to travel) was rejected in both Belle Terre and Petaluma. Arguments that education and housing are fundamental constitutional rights subject to the equal protection clause were explicitly denied in Rodriguez v. San Antonio Independent School District (1973) and Lindsey v. Normet (1971), respectively. The upshot is that the Supreme Court has greatly narrowed the scope of legal tools by which the federal courts can strike down the invisible wall protecting suburban communities against residential integration.

An Alternative Interpretation. We would suggest that such a conclusion is premature and emphasizes the least important problem in residential segregation. First, the door in the invisible wall is wide open through other perfectly usable legal remedies, particularly federal legislation and state constitutions, which may prove to be superior to the interstate commerce or equal protection clauses. The implementation of both statutory and judicial remedies for residential segregation is proceeding without any evidence of interference by the U.S. Supreme Court. Failure to obtain a federal constitutional remedy for residential segregation may make the progress of suburban integration more difficult, but hardly impossible.

Second, too much is being made of the political philosophies of the Court's admittedly conservative majority as an explanation for these recent decisions. Such an interpretation is simplistic. (The Belle Terre opinion was written by

Justice William O. Douglas.) A liberal majority might have ruled differently. However, the political sentiments of the justices do not make its rulings either constitutionally correct or politically feasible. Too little attention has been paid to the genuine difficulties that federal courts encounter in trying to read education, housing, and travel into the U.S. Constitution as "implicit rights;" such rights are simply not mentioned at all. The painstaking task of social reform in a democracy is to build majority support, or at least acquiescence. The very substantial advances made in civil rights and school integration since Brown v. Board of Education of Topeka (1954) are evidence of the capacity to do so. In the final analysis, the Supreme Court is being criticized for exercising "judicial restraint" in leaving the resolution of obviously "political" questions to the Congress and the states. Although such a judicial philosophy is of long standing and tied to "strict construction" of the Constitution, we will suggest that there are other pertinent grounds for such a position.

Third, focusing on the political sentiments of the present Court -- compared to what some more ideal Court would have done -- simply misdirects our attention from the most important problem to be confronted in advancing residential integration. The controversy over the recent trend in federal decisions has focused largely on the legal technicalities, as advocates of residential integration search for new strategies to overcome the Supreme Court's now rather obvious reluctance to discover a constitutional mandate for the judicial remedy of residential segregation. Not only is it the case, contrary to most critics, that the zoning or growth management barriers to residential integration have beeneffectively knocked down, but these barriers are the least important problem. The real difficulty is to build low and moderate income housing in the suburbs. The legal tools for doing so are available. The political support and funds are not. Ultimately, the will and

the money to construct such housing is a legislative, not a judicial, problem. The New Jersey Supreme Court put the matter succinctly when it observed in Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (1975) that neither municipalities nor the court itself build housing; rather they regulate land use and building construction. Either private builders or legislatures must supply housing. The issue is what effect judicial removal of zoning barriers in suburban areas will have on the supply and cost of housing.

The Partially Open Door. While the Supreme Court has concluded that there is no federal constitutional mandate for judicial intervention in local growth management, housing markets, or educational funding -- absent a direct showing of intentional racial discrimination under the state action doctrine, which is manifestly unconstitutional -- it has specifically not attacked federal statutory or state constitutional grounds for intervention in the same problems. On the contrary, it appears that the Supreme Court has actively endorsed the use of the Fair Housing Act of 1968, which provides for federally subsidized low and moderate income housing.

In the Arlington Heights case, a nonprofit housing corporation was refused a rezoning for the construction of federally subsidized multifamily housing in a Chicago suburb that had a virtually all-white population living in single-family homes. The district court dismissed the suit, but was reversed by the 7th Circuit on appeal. The circuit court found evidence of a racially discriminatory effect violating the equal protection clause. The Supreme Court overturned the appeals court, because there was no evidence of a discriminatory intent, a point already conceded by the appeals court.

The principle at stake here is the distinction between intention and effect in racial discrimination. This distinction was enunciated in Washington v.

Davis (1976). There the Supreme Court upheld testing procedures which turned down a higher pro- portion of black than white police recruits. It declared that there must be clear intention to discriminate demonstrated on the face of a statute or in its application. "Our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact" (Washington v. Davis, 1976, p. 239). This position explicitly rejects the contention that disproportionate impact "standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination ..." (Washington v. Davis, 1976, p. 244).

Having rejected the equal protection argument, however, the Supreme Court then specifically remanded the Arlington Heights case to the 7th Circuit with instructions to reconsider the suit under the Fair Housing Act. The appeals court concluded on remand that the "defendant [Village of Arlington Heights] has a statutory obligation to refrain from zoning policies that effectively foreclose the construction of any low-cost housing within its corporate boundaries" (Arlington Heights, 1977, p. 1285). The appeals court ruled that, although discriminatory effects may be irrelevant under the equal protection clause, they are sufficient grounds under the Fair Housing Act if foreseeable and susceptible to relief, regardless of the intent. The Fair Housing Act provides a basis for such relief. The appeals court determined that even close cases should be decided in favor of integrated housing in order to enforce the the purpose of the statute. The Supreme Court did not have to reflect very hard to forecast what the 7th Circuit would do on remand.

A similar position had already been adopted by the 8th Circuit in U.S. v. City of Black Jack, Missouri (1974), a case from St. Louis County. In 1969, Park View Heights Corporation, a nonprofit church-related group, purchased land

in an unincorporated area of the county with plans to build federally subsidized multifamily housing. The residents incorporated themselves and adopted a zoning ordinance which excluded multifamily housing. The federal district court twice rejected lacked standing to sue and that the controversy was not ripe for adjudication. The 8th Circuit twice reversed and finally ordered a rezoning under the Fair Housing Act.

Exclusionary zoning restrictions have been struck down across the board in both Pennsylvania and New Jersey. These decisions explicitly require multifamily zoning based on regional housing needs and forbid unreasonable lot size minimums. The Pennsylvania Supreme Court declared in Appeal of Kit-Mar Builders (1970, p. 768) that "communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not entire area". A similar position was taken in National Land and Investment Co. v. Kohn (1966, p. 610). "Zoning provisions may not be used ... to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring."

The best known state cases are the landmark decisions of the New Jersey Supreme Court in Robinson v. Cahill (1972-77), Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (1975), and Oakwood at Madison, Inc. v. Township of Madison (1977). In Rodriguez, the U.S. Supreme Court upheld local property taxation as a scheme for funding public education in Texas, in effect overturning the Serrano v. Priest (1971) decision of the California Supreme Court. Whereas the Serrano principle was based on the Fourteenth Amendment, Robinson was decided strictly under the New Jersey state constitution. The various decisions in the Robinson case have forbidden fiscal disparities among

school districts, ordered a drastic change in state aid to school districts, and forced adoption of a state income tax.

The principal conclusion of both the Mount Laurel and Madison decisions was that, explicitly following the lead of the Pennsylvania Supreme Court, fiscal or environmental justifications for exclusionary zoning policies are unacceptable. Such restrictive practices violate the state constitution and the enabling legislation for municipal zoning, which implicitly incorporate regional housing needs into their "general welfare" requirements.

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further, the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing communities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality (Mt. Laurel, 1975, p. 727).

The Mt. Laurel decision responded to this problem by requiring developing communities to base their zoning regulations on fair share plans. Each municipality must "plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries;" moreover, "it may not adopt relations or policies which thwart or preclude that opportunity" (Mt. Laurel, 1975, p. 727). The recent Madison decision expands this fair share obligation. Although municipalities cannot be compelled to build low and moderate income housing, they must overzone for such housing so as to minimize its land costs. The purpose of such overzoning is to affect as much as possible the filtering process in regional housing markets, so as to increase the supply of lower cost suburban housing to low and moderate income

households. Suburban communities must design their land controls on the basis of such "least cost zoning" (Scott, 1977).

The U.S. Supreme Court has declined to review either Robinson or Mt. Laurel. The decision of the New Jersey Supreme Court to handle these cases under the state constitution has important implications in forestalling federal review or legislative revision which are relevant to other states (Rose, 1975). A different approach has been adopted in Massachusetts, where the Zoning Appeals Law of 1969 permits the state housing agency to override local zoning ordinances by petitioning a state appeals board. Although the political effectiveness of this appeals procedure is disputed, it is a significant step at the state level in the same direction as the Fair Housing Act (Altman, 1976; Glazer, 1974). There are statutory bases by which federally or state subsidized housing can be placed in suburban sites.

Growth Management Schemes. To this point, we have emphasized the positive side of the argument that federal and state tools are readily available for the advancement of residential integration, with at least the tacit approval -- and possible open support -- of the U.S. Supreme Court. Contrary to Pearlman and other critics, we would also suggest that it is more accurate to de-emphasize the negative side of the argument that federal constitutional tools have been forbidden. Such criticism is based, in our view, on a serious misinterpretation of the recent Ramapo and Petaluma decisions.

We would suggest that these two approvals of local growth management schemes have been overdramatized. There is no doubt in our mind that such schemes incorporate highly refined exclusionary techniques under the guise of development planning. In our view, however, the courts were persuaded to accept the schemes precisely because they included a perceptible shift toward accep-

tance of an obligation to provide low and moderate income housing. Although this view is completely at variance with that held by critics of the Ramapo and Petaluma plans, we believe the view is both defensible and accurate.

The Ramapo plan consists of two distinct growth management policies. The first is aimed at preventing urbanization by the control of residential densities; the second at providing adequate public facilities for permitted population (or avoiding the fiscal burdens of population growth, if the reader will). These policies were implemented by a revised zoning ordinance and a capital improvements program adopted under a new master plan. The capital improvements are based squarely on the residential densities and development timing specified in the revised zoning ordinance. No area may be developed before its infrastructure is provided. The capital improvements program controls the timing and location of new development for a period of eighteen years. Issuance of building permits is subject to a point system based on the availability of various public facilities controlled under the capital improvements program. This Ramapo scheme was subjected to three legal challenges by developers in the New York courts to an interim development ordinance (which prohibited building permits for six months in areas designated for zoning changes) and the point system for issuing building permits. Ramapo was ultimately sustained on each challenge; and a final appeal to the U.S. Supreme Court was dismissed.

It is true that the position of the town had been carefully prepared by its legal and planning consultants. The growth management program consisted of ordinances implementing a master plan. At each step, the ordinances were based on state statutory authorizations for master planning, zoning, capital programming, and official mapping. The cumulative effect was to make it legally difficult to challenge the planning process, even at those two crucial points

(the interim development ordinance and the point system for controlling building permits) where no explicit statutory authorization existed that were the objects of the three suits (Emanuel, 1975; LaFontaine, 1973; Freilich, 1975).

Nevertheless, the courts were ultimately persuaded by more than these superficial legal justifications for the Ramapo plan. First, the development controls were allegedly temporary in character, limited to the eighteen-year period of the capital program. Second, what presumably prevents a later extension of this period is the explicit requirement for all areas to be furnished with infrastructure adequate for designated residential densities within the period. Third, "The developer is also given the right to speed up the development date by agreeing to provide the necessary facilities for accumulation of the required points" for building permits (Freilich, 1975, p. 367). Fourth, the Ramapo plan included a specific formula for low and moderate income housing, which has been constructed by a local housing agency. The New York Court of Appeals concluded in its opinion that:

> ... timed growth, unlike the minimum lot requirements recently struck down by the Pennsylvania Supreme Court as exclusionary, does not impose permanent restrictions upon land use . ... Its obvious purpose is to prevent premature subdivision absent essential municipal facilities and to insure continuous development commensurate with the Town's obligation to provide such facilities. They seek not to freeze population at present levels but to maximize growth by the efficient use of land, and in so doing testify to this community's continuing role in population assimilation (Golden v. Ramapo, 1971, p. 302).

The New York courts were careful to warn Ramapo about disguised attempts at exclusionary zoning. "What we will not countenance ... under any guise, is community efforts at immunization or exclusion" (Golden v. Ramapo, 1971, p. 302). However, the Petaluma plan reveals the principal flaw in this defense of Ramapo's growth management scheme. Overturning the Petaluma plan as

unconstitutional, the federal district court found evidence of deception in the community's testimony concerning the burden imposed on public facilities and services by development. A population ceiling of 55,000 was set in a revision of the 1962 master plan which had forecast population at 77,000. Building permits for developers constructing five or more units annually were limited to 500 per year and auctioned, as in Ramapo, by a point system. A similar technique was specifically rejected in New York in Albrecht Realty Co. v. Town of New Castle (1957). Developers were not allowed to pay for infrastructure. The district court concluded that Petaluma had deliberately limited provision of public infrastructure to the new 55,000 population ceiling and then cited lack of such infrastructure as the justification for growth controls. For example, the water contract negotiated to 1990 with Petaluma's supplier was set for a population of 55,000; additional water supplies were presumably available: "an inquiry into the facts reveals that there is no connection between the availability of water and the exclusionary zoning measures taken" (Petaluma, 1974, p. 583).

> The city is able, at the present time, to return to absorption of existing market and demographic growth rates without exceeding the capacity of city facilities. Such facilities are either now in place, under construction, or capable of being augmented by new capacity and at all times will be adequate for anticipated real demographic and market demands. ... the city is well able to expand at market and demographic rates without a crisis in its water supply. The city has not established that any of its other facilities is in any way threatened by residential growth at market or demographic rates (Petaluma, 1974, p. 578).

The district court decision was reversed on appeal by the 9th Circuit, and the U.S. Supreme Court declined to review. The district court rested its decision on two fundamental considerations, after finding deception in the evidence submitted by Petaluma. First, it evaluated the "cumulative impact" of

the Petaluma plan if proliferated throughout the San Francisco metropolitan area and concluded that there would be severe effects on the regional housing market. This cumulative impact test may be found in the Pennsylvania cases already cited. Second, it determined that local exclusionary practices violated the constitutional right to travel of citizens under the interstate commerce clause.

In reversing, the 9th Circuit held that the Petaluma plan was not exclusionary in its effects -- indeed, had quite the opposite impact on the regional housing market. The appeals court attacked the cumulative impact argument at two points. First, it pointed out that 500 building permits was not a flat ceiling, since it was applied only to developers building five or more units in a year (which, of course, effectively excludes multifamily developments): "if Petaluma had imposed a flat 500-unit limitation on all residential housing, the effect ... would clearly be to retard to a substantial degree the natural growth of the City. Petaluma, however, did not apply the 500-unit limitation across the board, but instead exempted all projects of four units or less" (Petaluma, 1975, p. 902). Second, the particular plan adopted in Petaluma would increase multifamily units in comparison to the previous zoning ordinance. One-half of the 500 units had to be multifamily.

The appeals court took the position that the local growth management scheme did not infringe upon interstate commerce, which has no relationship to the purchase of housing. Although the developer plaintiffs had standing to sue on other grounds, they had no standing on constitutional grounds of right to travel, which was being asserted on behalf of third parties not involved in the suit. The matter was a purely state concern. "If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state

legislature's and not the federal court's role to intervene and adjust the system" (Petaluma, 1975, p. 908).

The Judicial Problem. The intent to discriminate on the grounds of race is manifestly unconstitutional, as stated clearly enough in Village of Euclid v. Ambler Realty Co. (1926), Shelley v. Kraemer (1947), and Brown (1954). However, it is difficult to discern in the U.S. Constitution any direct mention of rights to housing or education; such matters were left in the federal system to the states. We suggest that critics of the Supreme Court treat too lightly the real judicial difficulties involved in trying to read housing and education into the U.S. Constitution, so that they must fall back on the political sentiments of the Court's conservative majority as an explanation.

The judicial dilemma in judging the effects, rather than the intent, of zoning policies involves three distinct issues. The first is that the direct link between local land use regulation and the U.S. Constitution is through the taking issue under the eminent domain clause, designed for the protection of property rights against government abuse, which may be in direct conflict with proposed judicial relief of residential segregation. The second issue is the apparent legal reasonableness of growth management schemes designed along the lines of the Ramapo plan, which is alleged to be preparation for development with controlled timing of the fiscal burden imposed by infrastructure requirements, so long as provision is made for low and moderate income housing. The third issue is whether residential segregation is susceptible to judicial relief by the federal courts.

The Supreme Court is being asked to ignore the traditional constitutional doctrine governing the taking issue on the argument that exclusionary zoning practices are directly responsible for residential segregation, which may be

relieved by judicial banning of such practices. The Court must read "implicit" rights to suburban housing and education into the equal protection and interstate commerce clauses under circumstances where it must abandon the traditional policy of judicial restraint to overturn the judgment of state and local legislatures, seriously affecting federal-state-local relations in the face of existing Congressional action on fair housing.

The U.S. Constitution deals with the division of powers, checks and balances, and the political or civil liberties of citizens, with special provisions to protect the rights of racial minorities against discrimination practiced or sanctioned by public action. The relationship of housing and education to the exercise of fundamental rights and liberties is not discussed in the U.S. Constitution, which does, however, focus on property rights. State constitutions tend to be more detailed and explicit about social and economic problems, a situation which may be a perfectly appropriate division of functions within the federal system. This very real dilemma is voiced by the 9th Circuit in its Petaluma opinion. "Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation. The reasonableness, not the wisdom, of the Petaluma Plan is at issue in this suit" (Petaluma, 1975, p. 906).

Consider in this light the Valtierra and Eastlake cases. Critics take the U.S. Supreme Court to task for permitting local referenda on low-income housing and rezonings, respectively. There is, of course, little doubt as to the outcome of such referenda. The Congress would be, in our view, fully justified in overriding such referenda through the Fair Housing Act. Lynch mobs cannot be permitted to hang people simply because the hanging is popular. Consider, however, that critics are asking the Supreme Court, not the Congress, to strike

down home rule and direct democracy. Even a liberal court should properly reflect upon such an action before taking it.

The taking issue is the essential problem addressed in the Arlington Heights decision. The case was sent back to the 7th Circuit for reconsideration under the Fair Housing Act because the Supreme Court found the obvious language of the eminent domain clause too difficult to ignore in comparison to the argument that implicit rights to housing and education, judged in terms of effects and not intent to discriminate, may be found in the equal protection and interstate commerce clauses. The Supreme Court concluded that the underlying motivation for the refusal to rezone by Arlington Heights was the protection of property values, which would be affected by the requested rezoning, rather than racial discrimination. This conclusion may be suspect, but it is hardly an unlikely one.

> Many of the opponents [of rezoning] ... focused on the zoning aspects of the petition, stressing two arguments. First, the area always had been zoned single-family, and the neighboring citizens had built or purchased there in reliance on that classification. Rezoning threatened to cause a measurable drop in property value for neighboring sites. Second, the ... apartment policy ... called for ... [multifamily] zoning primarily to serve as a buffer between single-family development and land uses thought incompatible, such as commercial or manufacturing districts (Arlington Heights, 1977).

This issue is also stressed by the 9th Circuit in its Petaluma opinion. In the view of the appeals court, all land use regulations will, by definition, involve restrictions on individual property rights. Since such restrictions are quite likely to increase housing costs, any examination of effects, without regard for motive or intention, is likely to find evidence of "discrimination" through exclusion. Such effects in land use restrictions are probably inevitable (unless an explicit policy of least cost zoning is adopted as required by Madison).

> The existence of an exclusionary purpose and effect reflects, however, only one side of the zoning regulation. Practically all zoning restrictions have as a purpose and effect the exclusion of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the exclusion bears any rational relationship to a legitimate state interest. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act (Petaluma, 1975, p. 906).

This attention to the legitimate purposes which may be served by land use controls, confounding the effects of such controls if the motives are not examined, is not exclusively a federal preoccupation. The Pennsylvania Supreme Court, which with its New Jersey counterpart has been at the forefront of recent zoning reform, has pointed out the same problem. National Land comments that, "Every zoning case involves a different set of facts and circumstances in light of which the constitutionality of a zoning ordinance must be tested. Therefore, it is impossible for us to say that any minimum acreage requirement is unconstitutional per se" (National Land, 1966, p. 607). This case-by-case evaluation must rest upon a determination of the public purposes to be served by the zoning restriction: "it must always be ascertained at the outset whether, in fact, it is the public welfare which is being benefited or whether, disguised as legislation for the public welfare, a zoning ordinance actually serves purely private interests" (National Land, 1966, p. 611).

In addition to the protection of property values, a legitimate purpose to be served by local land use controls may be timing the fiscal burden of residential development, which is the heart of the Ramapo and Petaluma plans. This position, of course, is the one accepted by the New York courts in the Ramapo suit: "where it is clear that the existing physical and financial resources of the community are inadequate to furnish the essential services and

facilities which a substantial increase in population requires, there is a rational basis for 'phased growth' ..." (Golden v. Ramapo, 1971, pp. 304-305). The same issue, however, is addressed by the Pennsylvania Supreme Court in National Land: "we do not mean to imply that a governmental body may not utilize its zoning power in order to insure that the municipal services which the community requires are provided in an orderly and rational manner" (National Land, 1966, p. 610). There is reason to believe that the New Jersey Supreme Court could accept the Ramapo approach if fitted into its fair share or least cost zoning requirements. "We now say only that, assuming some type of timed growth is permissible, it cannot be utilized as an exclusionary device or to stop all further development and must include early provision for low and moderate income housing" (Mt. Laurel 1975, p. 732, n. 20).

The Housing Market. The Warth v. Seldin decision has been subjected to special scrutiny by critics of the Supreme Court, because it denied both developer and minority plaintiffs standing to sue an admittedly exclusionary zoning ordinance (in Penfield, New York, a suburb of Rochester). Four of the nine justices on the Court dissented in this controversial holding, which supported both the district and circuit courts.

> We must assume, taking the allegations of the complaint as true, that Penfield's zoning ordinance and the pattern of enforcement by respondent officials have had the purpose and effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. We also assume, for purposes here, that such intentional exclusionary practices, if proved in a proper case, would be adjudged violative of the constitutional and statutory rights of the persons excluded (Warth v. Seldin, 1975, p. 502).

Much of the opinion is a technical exposition of why the various plaintiffs had no standing, either as aggrieved individuals or for a class action suit on

the behalf of others similarly excluded. The 1962 ordinance zoned 98 percent of vacant land for detached single-family housing with large minimum lot and building size requirements. Only 0.3 percent of available residential land was zoned multifamily (including townhouses) with cost-increasing restrictions. The plaintiffs argued that Penfield's zoning regulations and practices excluded low and moderate income households (and by implication minority racial and ethnic groups) through increased housing costs, raised tax rates and housing prices in Rochester, and deprived developers of potential profits from the construction of low and moderate income housing in Penfield.

Nevertheless, the crucial point of the Warth case is the argument that, even if standing were granted, no judicial relief would be possible, because exclusion of the plaintiffs was not accomplished by the zoning ordinance. On the contrary, the Supreme Court's majority concluded that income distribution and market forces not controllable by judicial intervention were the factors responsible for exclusion of both developers and minority households (the dissent of the Court's liberal minority to this view is evidence not of its falsity but of the division within the Court's ranks over political philosophy).

> We may assume, as petitioners allege, that respondents' actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' inability to locate suitable housing in Penfield reasonably can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions. Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed. ... Instead, petitioners claim that respondents' enforcement of the ordinance against third parties--developers, builders, and the like--has had the consequence of precluding the construction of housing suitable to their needs at prices they might be able to afford. ... But the record is devoid of any indication that

> these projects, or other like projects would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary--that their inability to reside in Penfield is the consequence of the economics of the area housing market, rather than of respondents' assertedly illegal acts. In short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury (Warth v. Seldin, 1975, pp. 504-507).

The Warth opinion points out the Achilles heel of the criticisms being levelled at the Supreme Court. If the removal of zoning practices will have no substantial effect on the supply of low and moderate income housing in suburban areas or the price of such housing throughout metropolitan markets, the controversy is beside the point, since the Fair Housing Act (and comparable state policies like the Massachusetts Zoning Appeals Law or the Mt. Laurel and Madison precedents) is available to strike down local zoning barriers to subsidized housing. The least cost zoning requirement of Madison is aimed explicitly at aiding the filtering process in the housing market. Construction of subsidized housing is a federal or state problem, not a municipal or judicial one. The New Jersey Supreme Court assumes that zoning practices will substantially influence the trickle-down effect of the filtering process, although this relationship appears not to have been investigated empirically to date.

The evidence which links residential segregation to exclusionary zoning practices is weak. The relationship has been widely asserted, rather than demonstrated. The U.S. Supreme Court may not be very wide of the mark in Warth. The two principal studies finding such evidence base their conclusions largely on observed correlations between income segregation and number of

independent zoning authorities in metropolitan areas (Branfman, 1973; Hamilton, 1975). This evidence does not bear up well under scrutiny.

The principal difficulty is that such studies completely fail to specify an adequate model of the factors influencing income and racial segregation, particularly the relative importance of market forces, land use regulations, and racial discrimination (Schafer, 1975, p. 2). Schafer argues that the empirical results reported in the Branfman study suffer from specification bias introduced by the omission of any variables explaining the role of the unregulated housing market, including income and taste differences in demand for housing, the relationship of employment opportunities to housing supply, and differences in in urban form or density of development which depend on the timing of urban growth (Schafer, 1975, pp. 7-10). "The major point is that we would expect income clustering in the absence of land use regulations. Consequently, it is crucial that models that claim to explain the geographic distribution of households by income incorporate measures that describe the income clustering due-to the normal operation of supply and demand in the housing market" (Schafer, 1975, p. 8). Precisely this point forms the heart of the Warth opinion.

Schafer suggests that income and racial segregation do not operate the same, despite the allegation that land use controls practice racial discrimination by raising housing costs to low and moderate income households, an argument rejected in Warth. If land use controls function through income differences, both poor whites and blacks should be excluded from suburban communities. Schafer's analysis of the 15 largest SMSA's indicates that while between 0.8 and 34.6 percent of low-income black families live in the suburbs, the proportion of low-income white families rises to between 24.5 and 90.9

percent (Schafer, 1975, p. 16). It appears that income and race have different effects on residential location.

The exclusionary zoning argument emphasizes the supply side of the housing market, while ignoring the demand side. In doing so, the argument assumes that zoning restrictions leave unmet demand (Schafer, 1974, p. 91). Schafer challenges this assumption by estimating 1972 demand for apartments in 45 suburban municipalities with restrictive zoning ordinances located in the Boston metropolitan region. Unmet demand was found in only 12 of those municipalities (Schafer, 1974, p. 98). In 1967, private multifamily units accounted for 42 percent of housing startsexcluding mobile homes (Schafer 1974, p. 13). His data show that high suburban proportions of multifamily starts were found in many major SMSA's of the Northeast and Midwest.

Policy Recommendations. We have argued that the door through the invisible wall of suburban exclusionary zoning and growth management practices is open despite the widely criticized trend in the Supreme Court's opinions in this area; that those opinions have been partially misread on several important issues; and that focusing on legal tactics for the removal of local zoning restrictions overlooks the most important barrier to residential integration.

The legal assault on zoning restrictions and growth management policies is misdirected. Even least cost zoning, under the Madison doctrine of the New Jersey Supreme Court, will affect to an unknown degree only the trickle-down effect of the filtering process in metropolitan housing markets. The New Jersey County and Municipal Government Study Commission points out in its report on multifamily development that, "If it becomes impossible to make available units of any kind to the people who represent the unmet housing market, no reform

dealing with land use or with municipal service costs will have any meaningful impact on the problem" (1974, p. 119).

Subsidized housing constructed under the Fair Housing Act cannot be excluded by any local policies. Seeking a constitutional mandate for residential integration is implicitly asking the nine justices of the U.S. Supreme Court to do what the executive and legislative branches will not, in order to increase a trickle of suburban housing to the poor. The key to striking down zoning barriers to low and moderate income households is the Fair Housing Act (and state counterparts like the Massachusetts Zoning Appeals Law), which will be supported by the Supreme Court. Racial discrimination in the housing market is illegal. The solution -- which must be legislative, not judicial -- is either the subsidized provision in high volume of low and moderate income housing in suburban areas or the transfer of housing subsidies directly to low and moderate income households.

This article is not intended as a defense of the U.S. Supreme Court. Rather, our concern is with the real issue at stake, which is the appropriate political and legal strategy for building sufficient consensus or acquiescence to carry out residential segregation through massive subsidies to the poor on the supply and/or demand side of metropolitan housing markets. Pearlman admits that the Supreme Court is not in a strong position to do so. We do not agree that the U.S. Constitution will bear the burden asked of it; the Fair Housing Act must. The decisions most criticized -- Ramapo, Petaluma, Arlington Heights, and Warth -- present issues that are important to consider, because they challenge the assumptions underlying such criticism. It is politically important, in our view, that state legislatures and courts grapple with these issues in the process of building legislative and popular support for residential integration.

We suggest that critics overly stress the technical aspects of the recent Supreme Court decisions. In the Warth case, for example, they emphasize the standing to sue issue. Critics treat this issue as an example of evasion on the Court's part. The technical merits of standing to sue are secondary, in our view, to the Court's conclusion that judicial relief was impractical, based on the argument that exclusion resulted form economic, not legal, factors. Solving the problems created by income distribution is a legislative function.

Perhaps even more importantly, the Ramapo plan should be seen as an opportunity for, not a barrier to, implementation of the Fair Housing Act. There are two positive aspects of the plan. First, Ramapo had to commit itself to the construction of low-cost housing (as Petaluma had to commit itself to multifamily housing). Second, Ramapo had to commit itself to providing the infrastructure necessary for development of the entire town within a definite time period. Traditional zoning merely divides the land into use classes, without provision of infrastructure. The Municipal Land Use Law of 1975 in New Jersey required the adoption of local development plans on the Ramapo model by all municipalities, forming a statewide commitment to development under the Mt. Laurel guidelines (Miller, 1976).

There have been more far-reaching proposals for state assumption or supervision of land use controls (White, 1978); state assumption or regional sharing of commercial and industrial tax base, which could be extended to luxury housing and vacant land to promote low-cost construction (Ladd, 1976); and state funding of development infrastructure, local services, or the operating deficits imposed by subsidized housing (White, 1978; New Jersey County and Municipal Government Study Commission, 1974). A tax sharing scheme has been adopted in the Twin Cities metropolitan area. The Robinson opinions have greatly altered the funding of public education in New Jersey. The objective of such proposals

is either to overrule local restrictions along the lines of the Fair Housing Act or the Massachusetts Zoning Appeals Law, or to reduce suburban opposition to residential integration to the extent such opposition is based on fears of adverse fiscal impact. The key to the adoption of such proposals is the same as that required for large-scale housing subsidies -- legislative support based on popular consent or acceptance. The ultimate problem is not to persuade the justices of the Supreme Court, but the electorate and its representatives. The Supreme Court will follow their lead, and has already done at least part of its constitutional duty in trying to point out the way for the Congress and state legislatures.

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